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OVEREXTENSION OF ARBITRAL AUTHORITY: PUNITIVE DAMAGES AND ISSUES OF ARBITRABILITY—*Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989)

Abstract: Recently, commercial arbitrators' authority to award a full spectrum of remedies has greatly increased. In *Raytheon Co. v. Automated Business Systems, Inc.*, the United States Court of Appeals for the First Circuit affirmed an arbitral award of punitive damages. The court upheld the award despite the arbitrators' failure to address a pre-hearing objection to the arbitrability of such sanctions. This Note concludes that courts should require arbitrators to resolve pre-hearing challenges to their authority and recommends that arbitrators interpret broadly-drafted arbitration clauses to encompass only traditional contract remedies.

In *Raytheon Co. v. Automated Business Systems, Inc.*,¹ the United States Court of Appeals for the First Circuit held that broad arbitration clauses empower commercial arbitrators to impose punitive sanctions.² Raytheon challenged an award of punitive damages on two grounds: first, that the arbitrators were not authorized to grant such relief, and second, that the arbitrators violated Raytheon's fifth amendment right to a fair hearing by not expressly declaring the punitive damages claim arbitrable.³

The First Circuit rejected both of Raytheon's arguments. The court held that broad arbitration agreements authorize the award of exemplary damages,⁴ and that, because the arbitrators never prohibited the submission of evidence, they did not deprive Raytheon of its constitutional right to a fair hearing.⁵

The *Raytheon* decision overextends the authority derived from broad arbitration clauses. Even before *Raytheon*, arbitrators could formulate remedies previously confined to the judiciary without commensurate judicial restraints.⁶ *Raytheon* increases these powers by allowing arbitrators to avoid pre-hearing objections to their authority. Consequently, arbitrators can impose punitive sanctions despite their disputed powers, and then insulate those awards from judicial review.

1. 882 F.2d 6 (1st Cir. 1989). Judge Reinhardt, sitting by designation from the Ninth Circuit, wrote the *Raytheon* opinion.

2. *Id.* at 12. Broad commercial arbitration clauses provide generally for the resolution of all disputes without specifying the remedies available. See *infra* note 12.

3. *Raytheon*, 882 F.2d at 8. Fundamentally fair arbitration hearings entitle parties to notice and an opportunity to be heard. *Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979).

4. *Raytheon*, 882 F.2d at 10.

5. *Id.* at 8.

6. See *infra* notes 17-21 and accompanying text.

The *Raytheon* court could have limited the arbitrators' authority in two ways. First, the court could have required that arbitrators define the scope of their authority prior to any substantive hearings. Second, the First Circuit could have followed its own labor arbitration precedent and permitted commercial arbitrators to award punitive damages only when expressly provided for in the arbitration clause.⁷ Either of these approaches would discourage arbitrators from exceeding their authority and protect against unexpected liability.

I. AN OVERVIEW OF COMMERCIAL ARBITRATION

In less than twenty years, the use of commercial arbitration⁸ has increased over 250%.⁹ This expansion is attributable to arbitration's procedural and economic efficiency over litigation. Arbitration both decreases the time and money spent resolving disputes and circumvents much of the appellate process.¹⁰ Arbitration also provides contractual parties with a forum created to accommodate standard business practices.¹¹

Despite these advantages, broad arbitration clauses¹² may expose contractual parties to unexpected liability and remove judicial protections. The agreements create unintended liability by increasing the spectrum of available remedies. Under traditional contract doctrine, parties are only liable for compensatory damages,¹³ and courts rarely permit penalties for breach of contract.¹⁴ Recently, however, some

7. See *Bacardi Corp. v. Congreso de Uniones Industriales de Puerto Rico*, 692 F.2d 210 (1st Cir. 1982).

8. "Arbitration is a process by which parties voluntarily refer their disputes to an impartial third person The parties agree in advance that the arbitrator's determination, the award, will be accepted as final and binding upon them." M. DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* § 1:01 (rev. ed. 1988).

9. Comment, *The Scope of Modern Arbitral Awards*, 62 TUL. L. REV. 1113, 1113 n.2 (1988) (quoting R. COULSON, *BUSINESS ARBITRATION—WHAT YOU NEED TO KNOW* 8-9 (3d ed. 1986)).

10. *Id.* at 1114. See *infra* note 20 (discussing statutory restrictions on judicial review).

11. See M. DOMKE, *supra* note 8, § 2:01 (observing that "arbitration . . . serves to standardize business transactions and trade practices and to control the business ethics of the participants").

12. Most broad commercial arbitration clauses follow the American Arbitration Association's model format: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof." Commercial Arbitration Rules of the American Arbitration Association, *reprinted in* G. GOLDBERG, *A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION* app. A, 114 (1983) [hereinafter *Rules*].

13. S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 1338 (3d ed. 1968).

14. This limitation is often justified on two grounds. First, parties should be protected from overreaching and unfair dealing. Second, penalties are not essential to the agreement itself, but

courts have interpreted broad arbitration clauses to authorize awards of punitive, consequential, and liquidated damages, as well as injunctions and prejudgment interest.¹⁵ Because such clauses do not specify that arbitrators can impose non-traditional contract remedies,¹⁶ parties may be unaware that the agreements increase their potential exposure to liability.

If parties do know the extent of their liability, they may still want to avoid arbitration because it removes judicial protections. Arbitrators are not subject to procedural and substantive restraints similar to those that bind the judiciary. For example, arbitrators are not bound by rules of evidence¹⁷ or by substantive law.¹⁸ Their decisions on the merits are generally not reviewable, even if they commit errors of law or misinterpret facts.¹⁹ Finally, judicial review of the award itself is extremely limited,²⁰ leaving parties with little recourse once arbitra-

are in the nature of a security for performance. Note, *Punitive Damages in Arbitration: The Search for a Workable Rule*, 63 CORNELL L. REV. 272, 301 (1978). But see Barton, *The Economic Basis of Damages for Breach*, 1 J. LEGAL STUD. 277, 286-87 (1972) (noting that preclusion of agreed upon penalties interferes with the voluntary allocation of risks resulting from breach); Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 578-93 (1977) (arguing that enforcement of stipulated penalties efficiently insures against otherwise non-compensable consequences of breach).

15. See, e.g., *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 776 F.2d 269 (11th Cir. 1985) (punitive damages allowed); *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902 (9th Cir. 1986) (consequential damages allowed); *Harbor Island Spa, Inc. v. Norwegian Am. Line A/S*, 314 F. Supp. 471 (S.D.N.Y. 1970) (liquidated damages allowed); *Linwood v. Sherry*, 7 A.D.2d 751, 181 N.Y.S.2d 772 (N.Y. App. Div. 1958) (injunction allowed); *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59 (3d Cir. 1986) (prejudgment interest allowed).

16. Rule 43 of the Commercial Arbitration Rules states only that "[t]he Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and *within the scope of the agreement of the parties . . .*" Rules, *supra* note 12, at app. A, 119 (emphasis added).

17. See M. DOMKE, *supra* note 8, § 24:02.

18. See Comment, *supra* note 9, at 1117-19.

19. *Office of Supply, Republic of Korea v. New York Navigation Co.*, 469 F.2d 377, 379 (2d Cir. 1972).

20. The Federal Arbitration Act (FAA) allows judges to vacate an arbitral award only when the award was procured by corruption, fraud or undue means; when arbitrators exhibit partiality or corruption or other misconduct; or when arbitrators exceed their powers. 9 U.S.C.A. § 10 (West 1970). Most courts consider the FAA to be the exclusive grounds for vacating or modifying commercial arbitration awards. See, e.g., *LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986); *Tamari v. Bache Halsey Stuart Inc.*, 619 F.2d 1196, 1198 n.2 (7th Cir.), *cert. denied*, 449 U.S. 873 (1980).

The judicial doctrine of "manifest disregard" may provide alternative grounds for vacating arbitral awards. See, e.g., *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). Courts, however, have narrowly construed this exception. See, e.g., *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1131 (3d Cir. 1972); *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568, 572-73 (2d Cir. 1968).

tors render their decisions.²¹ Thus, when contracts include broad arbitration clauses, parties both increase potential liability and eliminate procedural protections.

II. THE FEDERAL ARBITRATION ACT

A. *An Historical Perspective*

Traditionally, judges were reluctant to enforce arbitration agreements. They perceived arbitration as a threat to the courts' jurisdiction.²² In 1925, Congress enacted the Federal Arbitration Act (FAA)²³ to reverse this common law limitation on arbitration.²⁴ The FAA governs written arbitration agreements "in any maritime transaction or a contract evidencing a transaction involving commerce," and ensures that these clauses are valid and enforceable.²⁵ Since its inception, the FAA has provided courts with a foundation from which to expand the scope of arbitrable issues.²⁶

In recent decades, the United States Supreme Court has fostered this expansion through the liberal construction of arbitration clauses.²⁷ In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,²⁸ the Court interpreted the FAA as "a congressional declaration of a liberal federal policy favoring arbitration agreements."²⁹ *Moses H. Cone* created a body of federal substantive law applicable to any arbitration agreement within the coverage of the FAA.³⁰ One

21. When arbitrators determine the scope of their own authority, that decision is subject to more intense judicial review. *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 166-67 (D.C. Cir. 1981); see *infra* notes 88-91 and accompanying text.

22. Despite this judicial hostility, courts still enforced arbitral awards. They refused, however, to grant specific performance of arbitration agreements, or to stay judicial proceedings instituted in breach of such agreements. Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 251-52 (1987).

23. Pub. L. N. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C.A. §§ 1-15 (West 1970 & Supp. 1989)).

24. See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (stating that Congress' preeminent concern in passing the FAA was to enforce private agreements to arbitrate).

25. 9 U.S.C.A. § 2 (West 1970). The FAA does not provide independent federal grounds for jurisdiction. When application of the FAA is based on commerce, parties must meet the diversity of citizenship and the jurisdictional amount requirements. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

26. See generally Kanowitz, *supra* note 22.

27. This judicial expansion first began in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967), when the Court held that the FAA applied to all contracts involving interstate commerce.

28. 460 U.S. 1 (1983).

29. *Id.* at 24.

30. *Id.*

year later, in *Southland Corp. v. Keating*,³¹ the Court emphasized that by enacting the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."³² Thus, courts must resolve questions regarding the scope of such agreements in favor of arbitration, regardless of conflicting state substantive law.³³

B. Punitive Damages Under the Federal Arbitration Act

A split in authority exists as to whether arbitrators can impose punitive sanctions.³⁴ In the context of labor arbitration, the majority of state and federal courts rarely permit arbitrators to award exemplary damages.³⁵ The First Circuit, adhering to the majority rule, has held that labor arbitrators cannot award punitive damages unless the collective bargaining agreement specifies that remedy.³⁶

Unlike labor arbitration, there is no general consensus in commercial arbitration regarding the award of punitive damages. Some state courts have barred commercial arbitrators from ever imposing such sanctions.³⁷ The leading state court case opposing punitive damages in commercial arbitration is *Garrity v. Lyle Stuart, Inc.*³⁸ In *Garrity*, the New York Court of Appeals ruled that arbitrators cannot award exemplary damages even when the parties expressly agree to that remedy.³⁹ Applying New York state law, the court held that arbitral

31. 465 U.S. 1 (1984).

32. *Id.* at 16.

33. This rule, however, does not apply to contrary state procedural policies. *Volt Information Sciences, Inc. v. Board of Trustees*, 109 S. Ct. 1248 (1989).

34. The Supreme Court came close to allowing a punitive award during arbitration in *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987). In *McMahon*, the Court declared RICO claims arbitrable despite statutory treble damages. The Court, however, emphasized the remedial rather than the punitive nature of RICO claims. *Id.* at 240. See generally Comment, *Punitive Damages in Securities Arbitration: The Unresolved Question of Pendent State Claims*, 37 CATH. U.L. REV. 1113 (1988).

35. See, e.g., *United Elec., Radio & Machine Workers, Local 1139 v. Litton Microwave Cooking Prod.*, 704 F.2d 393, 397 (8th Cir. 1983); *Norfolk & W. Ry. v. Brotherhood of Ry. Clerks*, 657 F.2d 596, 603 (11th Cir. 1981); *International Union of Operating Eng'rs, Local 450 v. Mid-Valley, Inc.*, 347 F. Supp. 1104, 1109 (S.D. Tex. 1972).

Some courts bar all punitive damages in labor arbitration. See, e.g., *School City of E. Chicago v. East Chicago Fed'n of Teachers*, Local No. 511, 422 N.E.2d 656, 663 (Ind. Ct. App. 1981); *Publishers' Ass'n v. Newspaper & Mail Deliverers' Union*, 280 A.D. 500, 507, 114 N.Y.S.2d 401, 407-08 (1952).

36. *Bacardi Corp. v. Congreso de Uniones Industriales de Puerto Rico*, 692 F.2d 210 (1st Cir. 1982).

37. See *Shaw v. Kuhnel & Assocs., Inc.*, 102 N.M. 607, 698 P.2d 880 (1985); *United States Fidelity & Guar. Co. v. DeFluiter*, 456 N.E.2d 429 (Ind. Ct. App. 1983).

38. 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

39. *Garrity*, 386 N.Y.S.2d at 832.

awards of punitive sanctions contravened public policy by displacing the state as arbiter of social sanctions.⁴⁰ Courts and commentators, however, have criticized the *Garrity* case for its absolute rejection of punitive damages awarded during commercial arbitration.⁴¹

In line with these criticisms of *Garrity*, a minority of state and lower federal courts permit commercial arbitrators to award punitive damages even when the contract does not specify that remedy.⁴² Until *Raytheon*, however, the Eleventh Circuit was the only federal court of appeal to follow this rule.⁴³ In *Willoughby Roofing & Supply Co. v. Kajima International, Inc.*,⁴⁴ the Eleventh Circuit affirmed a trial court's ruling that commercial arbitrators could impose punitive sanctions.⁴⁵ The trial court justified the award on three grounds. First, the court stated that under the FAA, broad arbitration clauses evince an intent to vest arbitrators with authority to decide virtually any contractual dispute.⁴⁶ Second, the court concluded that the parties could have limited the available remedies, but they chose not to restrain the arbitrator's authority.⁴⁷ Finally, the trial court rejected the *Garrity* rule because it involved state law and state public policy.⁴⁸ The court held that neither the FAA nor federal public policy bars arbitrators

40. *Id.* at 833-34. In his dissenting opinion, Judge Gabrielli argued that the public policy favoring arbitration outweighs the public policy disfavoring punitive damages "where the unjustifiable conduct complained of is found to be with malice." *Id.* at 837.

41. See, e.g., *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 598 F. Supp. 353, 364 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985) (determining that the *Garrity* rule would "undermine the chief advantages and purposes of arbitration"); Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U.L. REV. 953, 959 (1986) (arguing that "the *Garrity* doctrine may be seen as an anomaly, frustrating the goals of fairness and finality that are the essence of arbitration"); see also Note, *Punitive Damages in Arbitration: The Search For a Workable Rule*, 63 CORNELL L. REV. 272, 274 (1978); Note, *Arbitration: The Award of Punitive Damages as a Public Policy Question*, *Garrity v. Lyle Stuart, Inc.*, 43 BROOKLYN L. REV. 546, 550 (1976).

42. See, e.g., *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988); *Singer v. E.F. Hutton & Co.*, 699 F. Supp. 276 (S.D. Fla. 1988); *Peabody v. Rotan Mosle, Inc.*, 677 F. Supp. 1135 (M.D. Fla. 1987); *Ehrich v. A.G. Edwards & Sons, Inc.*, 675 F. Supp. 559 (D.S.D. 1987); *Rodgers Builders, Inc. v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985).

43. See *Bonar*, 835 F.2d 1378; *Willoughby Roofing & Supply Co. v. Kajima Int'l*, 776 F.2d 269 (11th Cir. 1985).

44. 598 F. Supp. 353 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985).

45. The Eleventh Circuit affirmed the case substantially on the basis of the trial court's analysis. 776 F.2d at 270.

46. *Willoughby*, 598 F. Supp. at 355. The court concluded that arbitrators are in a better position than judges to award punitive damages because they are more familiar with the practice of a given trade and they know what behavior transgresses the limits of acceptable commercial practice. *Id.* at 363.

47. *Id.* at 357.

48. *Id.* at 361.

from considering punitive damages claims.⁴⁹ Three years later, in *Bonar v. Dean Witter Reynolds, Inc.*,⁵⁰ the Eleventh Circuit reaffirmed that arbitrators can award punitive damages under broad arbitration agreements.⁵¹

III. *RAYTHEON CO. V. AUTOMATED BUSINESS SYSTEMS, INC.*

In *Raytheon Co. v. Automated Business Systems, Inc.*,⁵² the First Circuit followed the Eleventh Circuit's precedent and held that broad arbitration clauses empower commercial arbitrators to award punitive damages. The case involved a dealership contract that Raytheon and Automated signed in 1978.⁵³ The contract contained a general arbitration clause providing that "[a]ll disputes arising in connection with the Agreement shall be settled by arbitration . . . conducted according to the Rules of the American Arbitration Association."⁵⁴ The parties also stipulated that California law governed interpretation of the contract.⁵⁵

Several years later, a conflict arose and Automated demanded arbitration pursuant to the agreement. Automated alleged that Raytheon breached the contract, violated the duty of good faith and fair dealing, and committed a number of fraudulent acts. Automated sought compensatory and consequential damages, as well as punitive sanctions.⁵⁶

In response to Automated's demand, the American Arbitration Association assembled a three member panel.⁵⁷ Raytheon answered Automated's claim in a memorandum filed the day before hearings began. Addressing the request for punitive damages, Raytheon advised the panel that "[t]he arbitration agreement between the parties does not contemplate that punitive damages may be awarded for claims arising under the contract and *Raytheon does not consent to the submission of this issue to the panel.*"⁵⁸ Raytheon and Automated pro-

49. *Id.* at 359-61.

50. 835 F.2d 1378 (11th Cir. 1988).

51. In his concurring opinion, Judge Tjoflat doubted whether punitive damages were arbitrable because "[p]unitive damages . . . serve the societal functions of punishment and deterrence; unlike contract remedies, they are not designed to vindicate the parties' contractual bargain." *Id.* at 1389.

52. 882 F.2d 6 (1st Cir. 1989).

53. *Id.* at 7.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Brief for the Plaintiff-Appellant at 5, *Raytheon Co. v. Automated Business Sys., Inc.*, 882 F.2d 6 (1st Cir. 1989) (No. 89-1157) (emphasis in original).

ceeded to arbitrate their dispute, but neither the parties nor the arbitrators pursued the punitive damages issue.⁵⁹

One year later, in January 1988, the arbitrators rendered their decision.⁶⁰ The panel found in favor of Automated and awarded \$250,000 in punitive damages as part of the total remedy.⁶¹ The arbitrators neither explained the basis for their ruling, nor discussed the rationale behind their punitive award.⁶²

Raytheon appealed to the United States District Court for the District of Massachusetts, arguing that arbitrators cannot award punitive damages.⁶³ Affirming the arbitral award, the district court followed the Eleventh Circuit's precedent in *Willoughby* and *Bonar*, and held that arbitrators can award exemplary damages provided the contract does not expressly forbid that remedy.⁶⁴ The court did not, however, address Raytheon's pre-hearing objection to the arbitrability of punitive damages.

Raytheon appealed the district court's decision to the First Circuit, presenting three arguments regarding the award of punitive damages. First, the panel failed to publish any findings of fact to support its award.⁶⁵ Second, the panel violated Raytheon's right to a fair hearing by not expressing its intent to arbitrate the punitive damages claim.⁶⁶ Third, commercial arbitrators, like labor arbitrators, cannot award exemplary damages without both parties' consent.⁶⁷

The court dealt summarily with the first two arguments, holding that arbitrators are not required to publish findings of fact⁶⁸ and that

59. Raytheon never presented evidence to contest the punitive damages issue and the arbitrators "never said anything either way about Automated's claim for punitive damages or Raytheon's statement that it did not consent to the arbitration of the issue." 882 F.2d at 7.

60. *Id.*

61. *Id.* The arbitrators also awarded Automated \$408,000 in compensatory damages, \$121,000 in attorneys' fees and \$47,000 in expenses. In a counterclaim, Raytheon received \$8700. *Id.*

62. Because the arbitrators in *Raytheon* did not issue any findings of fact, it is unclear whether the punitive damages were based on tort or contract liability. If the penalty was based on breach of contract, even the *Willoughby* court would have prohibited such relief. See *infra* note 118; *supra* notes 44-49 and accompanying text.

63. *Raytheon Co. v. Automated Business Sys., Inc.*, No. 88-0895-MC, slip op. at 1-2 (D. Mass. Dec. 6, 1988) (WESTLAW, Federal library, Allfeds file), *aff'd*, 882 F.2d 6 (1st Cir. 1989). Raytheon also argued that the arbitrators based their decision on the wrong contract, and that the neutral arbitrator acted with partiality. *Id.* The district court ruled against Raytheon, *id.* at 5, and the issues were not appealed.

64. *Id.* at 4.

65. *Raytheon*, 882 F.2d at 8.

66. *Id.*

67. *Id.* at 9.

68. It is well established that arbitrators need not make formal findings of fact or state any reasons for their awards. See, e.g., *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363

Raytheon received a fair hearing.⁶⁹ Concerning the panel's authority to award punitive damages, the First Circuit did not apply California law as stipulated in the agreement.⁷⁰ Instead, because the contract involved interstate commerce, the court applied the FAA and federal case law.⁷¹ The court concluded that, under federal law, broad arbitration clauses empower arbitrators to award punitive sanctions.⁷²

In *Raytheon*, the First Circuit joined the Eleventh Circuit in expanding arbitral authority to fashion remedies not specified in the parties' contract.⁷³ In so doing, the court declined to follow its own labor arbitration precedent that allows punitive damages only if enumerated in the arbitration clause.⁷⁴ Explaining its departure from this precedent, the *Raytheon* court focused on the beneficial nature of punitive damages in effectively deterring fraudulent conduct.⁷⁵ Further, the court found "no compelling reason to prohibit a party which proves the same conduct to a panel of arbitrators from recovering the

U.S. 593, 598 (1960); *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 312 (7th Cir. 1981). This rule maintains arbitral efficiency by eliminating the time spent drafting opinions. Unfortunately, this rule also hinders effective judicial review since arbitrators need not articulate the rationale behind individual awards.

69. *Raytheon*, 882 F.2d at 8. The court held that no due process violation occurred because the arbitrators did not "take any action or make any affirmative statements" indicating that they would not hear the punitive damages claim. *Id.*

70. Under California law, commercial arbitrators may award punitive sanctions only if they are specifically provided for in the contract. *Belko v. AVX Corp.*, 204 Cal. App. 3d 894, 251 Cal. Rptr. 557 (1988). Despite the parties' stipulation that California law governed, the *Raytheon* court applied the FAA and federal law in determining that arbitrators can award punitive damages. 882 F.2d at 9. The FAA resolves issues concerning the interpretation and construction of arbitration clauses. *Willis v. Shearson/Am. Express, Inc.*, 569 F. Supp. 821, 823-24 (M.D.N.C. 1983). Thus, a choice-of-law clause designating a jurisdiction which prohibits arbitral awards of punitive damages may not prevent arbitrators from awarding that remedy. The provision determines only the substantive law that arbitrators must apply when deciding whether the parties' conduct warrants punitive sanctions. *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1387 (11th Cir. 1988).

The Supreme Court's recent decision in *Volt Information Sciences, Inc. v. Board of Trustees*, 109 S. Ct. 1248 (1989), may provide a basis for reconsidering the effect of choice-of-law clauses in commercial arbitration. The dispute in *Volt* concerned conflicting state and federal procedural law. See *supra* note 33 and accompanying text. The Court, however, indicated a general willingness to effectuate choice-of-law provisions in arbitration. 109 S. Ct. at 1254-56. One district court has relied on *Volt* to enforce choice-of-law clauses provided they are consistent with the goals of the FAA. *Flight Sys. v. Paul A. Laurence Co.*, 715 F. Supp. 1125, 1127 (D.D.C. 1989). The *Raytheon* court did not follow this extension of *Volt*, and distinguished *Volt* on the grounds that it did not deal with the scope of arbitration agreements. 882 F.2d at 11-12 n.5.

71. *Raytheon*, 882 F.2d at 9.

72. *Id.* at 10.

73. *Id.* at 9.

74. See *Bacardi Corp. v. Congreso de Uniones Industriales de Puerto Rico*, 692 F.2d 210 (1st Cir. 1982).

75. *Raytheon*, 882 F.2d at 12.

same damages" that the judiciary awards.⁷⁶ Like the district court, however, the First Circuit failed to fully consider Raytheon's pre-arbitration objection to the claim for punitive damages.

IV. THE FIRST CIRCUIT SHOULD HAVE REQUIRED THE ARBITRATORS TO DEFINE THE SCOPE OF THEIR AUTHORITY

Arbitral authority is contractually created,⁷⁷ and the contracting parties' intent controls interpretation of their agreement.⁷⁸ Parties can stipulate the available remedies in their arbitration clause,⁷⁹ and they are not required to arbitrate any matter beyond the scope of their contract.⁸⁰ In *Raytheon*, however, the broadly-drafted arbitration clause neither included nor excluded a punitive damages provision. The agreement merely stipulated that all disputes arising under the contract should be settled through arbitration.⁸¹

Although the First Circuit inferred an agreement to arbitrate punitive damages,⁸² other evidence suggests a contrary intent. For example, both parties stipulated that California law governed the contract.⁸³ Under California law, arbitrators cannot award punitive damages absent express authorization in the parties' contract.⁸⁴ If there is an inference to be drawn from the contract, it would be that the parties did not intend to include that remedy. At a minimum, this ambiguity, combined with Raytheon's objection, should have indicated to the arbitrators that no "meeting of the minds"⁸⁵ had occurred on the issue of punitive damages. Upon receiving Raytheon's written

76. *Id.*

77. *See, e.g., Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979).

78. *See, e.g., Automotive, Petroleum & Allied Indus. Employees Union v. Town & Country Ford, Inc.*, 543 F. Supp. 256, 258 (E.D. Mo. 1982), *rev'd on other grounds*, 709 F.2d 509 (8th Cir. 1983).

79. *See, e.g., El Hoss Eng'r & Transp. Co. v. American Indep. Oil Co.*, 289 F.2d 346, 350 (2d Cir.), *cert. denied*, 368 U.S. 837 (1961).

80. *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 165 (D.C. Cir. 1981).

81. *Raytheon Co. v. Automated Business Sys., Inc.*, 882 F.2d 6, 7 (1st Cir. 1989).

82. *Id.* at 10.

83. *Id.* at 7.

84. *See supra* note 70. Even if the parties knew that the FAA, rather than California law, governed the available remedies when they entered their contract in 1978, no federal court had yet allowed commercial arbitrators to award punitive damages. Thus, at the time of the contract, it is unlikely that either party intended to arbitrate punitive damages claims.

85. "[T]he intent of the parties that arbitration be the exclusive method for the settlement of disputes arising under the contract must be clearly manifested. . . . This concept may be best characterized as 'meeting of the minds,'" M. DOMKE, *supra* note 8, § 5:01.

objection,⁸⁶ and realizing that a viable issue of arbitrability existed, the panel should have immediately determined the scope of its authority under the contract. Instead, the arbitrators ignored Raytheon's objection and imposed punitive sanctions.⁸⁷

A. *Pre-hearing Determinations of Arbitral Authority*

The *Raytheon* court should have required arbitrators to determine the scope of their authority before considering substantive issues. Compelling arbitrators to resolve such matters prior to hearings would have two advantages. First, this requirement would prevent arbitrators from increasing their powers beyond those authorized in the arbitration agreement. When arbitrators determine whether they can hear an issue,⁸⁸ the availability of judicial review protects parties from abuse of arbitral authority.⁸⁹ The reviewing court must determine for itself whether the arbitrators exceeded their authority.⁹⁰ When making this finding, the court will uphold the arbitrators' assumption of jurisdiction only "where the scope of arbitration is 'fairly debatable' or 'reasonably in doubt.'"⁹¹ Reviewing courts thereby ensure that arbitrators cannot force parties to arbitrate matters unless they are specifically agreed upon.

86. *Raytheon* is the first commercial arbitration case in which one party submitted a pre-hearing objection to the arbitrability of punitive damages. In *B. Fernandez & HNOS., S. EN C. v. Rickert Rice Mills, Inc.*, 119 F.2d 809 (1st Cir. 1941), the First Circuit addressed an analogous case in which a party contested the scope of arbitral authority before hearings began. The court held that "[a] party is never required to submit to arbitration any question which he has not agreed so to submit," and narrowly construed the contract to limit the arbitrable issues. *Id.* at 815.

87. As the *Raytheon* court suggested, Raytheon probably should have insisted that the arbitrators rule on its objection. 882 F.2d at 8. Raytheon's inaction, however, should not overshadow the arbitrators' duty to resolve issues of arbitrability because they knew Raytheon would not actively pursue the dispute. After objecting to Automated's claim for punitive damages, Raytheon advised the panel that "it would not . . . brief the issues relating either to the arbitrator's power to award damages under the terms of the arbitration agreement, or to the propriety of an award." Brief for the Plaintiff-Appellant at 5, *Raytheon Co. v. Automated Business Sys., Inc.*, 882 F.2d 6 (1st Cir. 1989) (No. 89-1157).

Nor does the fact that Raytheon completed arbitration indicate that it consented to the panel's implied decision to arbitrate the matter. When one party objects to the arbitrability of an issue and does not clearly intend to forego judicial review, the issue is sufficiently preserved for judicial inquiry. *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 168 (D.C. Cir. 1981).

88. Arbitrators are clearly empowered to interpret the boundaries of their authority. *See, e.g., Hahnemann Univ. v. District 1199C, Nat'l Union of Hosp. & Health Care Employees*, 765 F.2d 38, 42 (3d Cir. 1985) ("The issue of an arbitrator's authority to resolve a dispute properly before her . . . rests in the first instance with the arbitrator").

89. *Davis*, 667 F.2d at 166-67.

90. *Id.* at 167.

91. *Id.*

Judicial review is undermined, however, if arbitrators disregard objections to their authority, as occurred in *Raytheon*, and then issue binding awards. Once arbitrators render awards, their actions are subject to only limited judicial review,⁹² as opposed to the more intense judicial review accorded decisions of arbitrability. Thus, ignoring objections to arbitral authority dilutes the judicial protections afforded arbitration participants. Forcing arbitrators to decide the scope of their authority prevents overextension of arbitral powers and maintains judicial oversight of the arbitration process.

Second, requiring arbitrators to define their authority would also avoid unexpected liability. Under this approach, when disputes over the scope of arbitral authority arise before hearings begin, arbitrators would explicitly determine the contractually permitted remedies. Consequently, parties would know the extent of their potential liability prior to entering arbitration, thereby enabling them to better evaluate both their settlement options and their financial exposure.

Requiring arbitrators to define the scope of their authority also has at least two disadvantages. Such a policy may discourage arbitration by increasing the costs of dispute resolution. Parties could expend additional time and resources formulating arbitral authority and contesting that authority before arbitration began. The policy also could lengthen the arbitration process, removing one of the advantages that arbitration provides in the commercial contract setting.⁹³ Yet these effects are outweighed by the lack of judicial scrutiny and the unexpected liability which result from the *Raytheon* decision. The better rule is to require commercial arbitrators to resolve pre-hearing objections to their authority. This policy would both maintain the judicial protections afforded arbitration participants and define the parties' potential liability.

B. Failure to Provide a Fair Hearing

The arbitrators' failure to determine the scope of their authority also violated *Raytheon's* fifth amendment right to due process of law. The fifth amendment entitles all parties in arbitration proceedings to fundamentally fair hearings.⁹⁴ In light of the spectrum of remedies

92. See *supra* notes 19-21 and accompanying text.

93. See *supra* note 10 and accompanying text.

94. *Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979) (quoting *Bell Aerospace Co. v. Local 516 UAW*, 500 F.2d 921, 923 (2d Cir. 1974)); see also *Harvey Aluminum, Inc. v. United Steelworkers*, 263 F. Supp. 488, 492 (C.D. Cal. 1967) (asserting that "parties have the right to assume that any arbitration hearing . . . will afford them the opportunity of presenting *all* of their material evidence") (emphasis in original).

available to arbitrators under broad arbitration clauses,⁹⁵ the *Raytheon* court should have more scrupulously protected this right to a fair hearing. Because fair hearings require notice and an opportunity to be heard,⁹⁶ the First Circuit should have held that arbitrators violate the fifth amendment if they disregard pre-hearing challenges to their authority and then grant the relief in controversy.

When arbitrators do not define the scope of arbitrable issues once objections arise, the parties have no guidelines to follow for submitting evidence. This lack of notice impedes the parties' opportunity to be heard. In *Hoteles Condado Beach v. Union de Tronquistas Local 901*,⁹⁷ the First Circuit affirmed that denial of the right to be heard is grounds for vacating arbitral awards. The court in *Hoteles Condado Beach* held that an arbitrator's refusal to consider a trial transcript was "so destructive of [the Company's] right to present [its] case, that it warrants the setting aside of the arbitration award."⁹⁸ The arbitrator in *Hoteles Condado Beach* never actively prevented any party from introducing evidence. Nevertheless, the court held that the arbitrator's failure to ascribe significance to the testimony violated the plaintiff's opportunity to be heard.⁹⁹

Like the arbitrator in *Hoteles Condado Beach*, the arbitrators in *Raytheon* failed to provide a fair hearing. In *Raytheon*, however, the arbitrators did more than ignore the evidence one party submitted. Instead, they undermined *Raytheon*'s opportunity to submit evidence by violating its right to notice of arbitrable issues.¹⁰⁰ The First Circuit upheld the arbitrators' conduct on the theory that *Raytheon* should have known the arbitrators would consider punitive damages when Automated "introduced . . . evidence which, if believed, supported the award of punitive damages."¹⁰¹ The court's statement, however, does not indicate that Automated expressly argued for punitive damages

95. See *supra* note 15 and accompanying text.

96. *Totem Marine*, 607 F.2d at 651; see also *Hoteles Condado Beach v. Union de Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985) (observing that "the arbitrator's role is to resolve disputes . . . once the parties to the dispute have had a full opportunity to present their cases").

97. 763 F.2d 34 (1st Cir. 1985).

98. *Id.* at 40 (quoting *Hoteles Condado Beach v. Union de Tronquistas Local 901*, 588 F. Supp 679, 685 (D.P.R. 1984), *aff'd*, 763 F.2d 34 (1st Cir. 1985)).

99. *Id.*

100. No due process violation would have occurred if *Raytheon* had contested the punitive damages claim during arbitration. Once a party voluntarily submits a claim to arbitration, it cannot await the outcome and then, if the decision is unfavorable, challenge the arbitrators' authority. See *Ficek v. Southern Pac. Co.*, 338 F.2d 655, 657 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965); see also *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140 (7th Cir. 1985).

101. *Raytheon Co. v. Automated Business Sys., Inc.*, 882 F.2d 6, 7 (1st Cir. 1989).

during the hearing, but merely that it submitted evidence supporting its tort allegations. This evidence, absent an argument for exemplary damages, did not provide Raytheon with adequate notice that the arbitrators might award such relief. Because Raytheon failed to receive proper notification, it did not actively contest Automated's punitive damages claim.¹⁰² Therefore, the arbitrators' silence deprived Raytheon of notice that the panel would arbitrate the claim and, consequently, of the opportunity to present relevant evidence.¹⁰³

Construing the right to a fair hearing to include such notice would ensure that parties are made aware of all arbitrable issues. At least one other federal court, however, would be reluctant to extend the fundamental fairness doctrine to encompass the situation in *Raytheon*. In *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*,¹⁰⁴ the Seventh Circuit held that commercial arbitrators provided a fair hearing to a party who "was never precluded from presenting whatever arguments and evidence he wished to present."¹⁰⁵ In *Moseley*, the arbitrators bifurcated the arbitration proceedings.¹⁰⁶ The appellant later claimed that the bifurcation prevented him from submitting evidence regarding his liability, thus depriving him of procedural due process.¹⁰⁷ The court found that no due process violation occurred because the arbitrators subsequently received evidence on the matter and "all parties were *adequately apprised* of the shift in procedures."¹⁰⁸

Raytheon, however, involved a greater interference with the parties' rights than occurred in *Moseley*. In *Raytheon*, the panel failed to advise either party that it intended to arbitrate the punitive damages claim, and Raytheon did not introduce evidence regarding that issue. Also unlike *Moseley*, the *Raytheon* decision upheld an award of damages beyond the parties' express agreement. Arguably, the arbitrators' action in *Raytheon* was more intrusive on the right to a fair hearing. The lack of notice in *Raytheon*, combined with expanding arbitral authority to devise damages, justifies extending the fundamental fair-

102. *Id.*

103. The court in *Raytheon* further justified the arbitrators' silence based on Raytheon's perfunctory treatment of the punitive damages claim. Referring to Raytheon's one sentence objection, the court stated that "it is not at all surprising that the arbitrators did not comment on the matter." *Id.* at 8. Apparently, the court forgot that Automated's claim for punitive damages was itself only a "single sentence in one of its claims for relief." *Id.* at 7.

104. 849 F.2d 264 (7th Cir. 1988).

105. *Id.* at 268.

106. *Id.*

107. *Id.*

108. *Id.* (emphasis added).

ness doctrine to include situations where arbitrators fail to reveal their intent to hear contested issues. To provide for constitutionally fair proceedings, arbitrators should announce all decisions regarding prehearing objections to the scope of their authority.

V. BROADLY-DRAFTED ARBITRATION AGREEMENTS
SHOULD NOT EMPOWER COMMERCIAL
ARBITRATORS TO AWARD PUNITIVE
DAMAGES

A. *The First Circuit Should Have Followed Its Bacardi Precedent*

Because arbitrators must interpret arbitration agreements to determine the scope of their authority, they need rules of construction for broadly-drafted clauses. The *Raytheon* court held that such agreements evince an intent to arbitrate punitive damages.¹⁰⁹ The First Circuit, however, could have prevented this extension of arbitral authority by following its own labor precedent. In *Bacardi Corp. v. Congreso de Uniones Industriales de Puerto Rico*,¹¹⁰ the First Circuit held that labor arbitrators cannot award punitive damages when “the award [does] not draw its essence from the collective bargaining agreement.”¹¹¹ Unless the arbitration clause expressly authorizes punitive damages, labor arbitrators are not empowered to award that relief.

In an effort to prevent arbitrators from awarding remedies not contractually specified, *Raytheon* argued that the *Bacardi* rationale should apply to commercial arbitration proceedings.¹¹² The First Circuit rejected *Raytheon*’s proposal because the “concerns which may warrant such a rule in the labor arbitration field are not present in the commercial arbitration context,” and declined to follow its own labor arbitration precedent.¹¹³

The *Raytheon* court’s rejection of the *Bacardi* precedent fails for two reasons. First, the policies behind punitive awards in labor and commercial arbitration are not contrary. The *Raytheon* court attempted to distinguish labor arbitration from commercial arbitration on the grounds that the former is one aspect of a continuing working relationship, while the latter is a one-time endeavor.¹¹⁴ The funda-

109. *Raytheon Co. v. Automated Business Sys., Inc.*, 882 F.2d 6, 10 (1st Cir. 1989).

110. 692 F.2d 210 (1st Cir. 1982).

111. *Id.* at 214.

112. *Raytheon*, 882 F.2d at 10.

113. *Id.* at 10–11.

114. *Id.* at 10. The court relied on the landmark decision in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 581 (1960), where Justice Douglas observed that commercial arbitration is a substitute for litigation, while labor arbitration is a substitute for

mental concerns with subjecting parties to punitive awards, however, remain whether the contractual relationship is continuous or limited in duration. In both situations, parties risk exposure to punitive sanctions that are not evident from the arbitration agreement, and they lack substantial protections from abuse of arbitral authority.¹¹⁵ Courts can alleviate these dangers in both the labor and the commercial contexts by mandating that arbitrators award exemplary damages only when the contract expressly grants that remedy.

Second, although the First Circuit ostensibly rejected the analogy between labor arbitration and commercial arbitration, the commercial arbitration precedent cited by the court relied extensively on labor cases.¹¹⁶ Contrary to the *Raytheon* court's statement, courts and commentators frequently cite labor precedents with approval in commercial arbitration situations.¹¹⁷ The First Circuit's invocation of the labor-commerce dichotomy, then, fails to justify its departure from the *Bacardi* rationale.

B. The Bacardi Rationale Facilitates the Arbitration Process

The *Raytheon* court should have followed the *Bacardi* precedent and permitted commercial arbitrators to award punitive damages only when the arbitration clause specifically grants that relief. This rule is preferable to allowing punitive sanctions absent an express prohibition for three reasons. First, the parties' contractual expectations are better accommodated. Exemplary damages are not allowed in a typical contract, and courts will usually refuse to enforce penalties upon

industrial strife. The concept of a continuing relationship in labor settings, however, is merely an additional rationale, rather than the exclusive justification, for limiting punitive damages in labor disputes.

115. See *supra* notes 15-21 and accompanying text.

116. The trial court in *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 598 F. Supp. 353 (N.D. Ala. 1984), *aff'd*, 776 F.2d 269 (11th Cir. 1985), referred to labor cases approximately forty times throughout its opinion. The court in *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988), which relied almost exclusively on the *Willoughby* decision, cited three labor arbitration cases. Despite its rejection of the labor arbitration analogy, even the *Raytheon* court cited a labor case to conclude that commercial arbitrators need not present formal findings of fact. 882 F.2d at 8.

117. See, e.g., *Swift Indus., Inc. v. Botany Indus. Inc.*, 466 F.2d 1125, 1130 (3d Cir. 1972) (noting that "the principles governing labor and commercial arbitration cases are similar"); M. DOMKE, *supra* note 8, § 1:02 (acknowledging that "both labor and commercial arbitration provide important points of reference, one for the other"); Note, *Punitive Damages in Arbitration: The Search For a Workable Rule*, 63 CORNELL L. REV. 272, 291-92 (1978) (observing that "[c]ourts should not ignore doctrines developed in the labor context when asked to enforce 'commercial' arbitration awards").

breach.¹¹⁸ The prohibition against punitive awards prevents parties from incurring unbargained for liability,¹¹⁹ and the mere inclusion of a broad arbitration clause should not negate this protection. Further, if parties must explicitly confer the authority to award punitive damages, they can better predict and prepare for the economic impact of such sanctions.

Second, the *Bacardi* rationale facilitates drafting arbitration clauses. As the protections afforded arbitration participants decrease and arbitral authority to award remedies expands, more parties will draft individualized arbitration agreements.¹²⁰ Parties can better formulate the authority they intend to grant arbitrators through the inclusion of available awards, rather than the exclusion of all potential remedies. The *Bacardi* approach permits parties to accurately convey their intentions and, consequently, to protect their interests.¹²¹ Under this rule, arbitration would remain an attractive alternative to litigation. Broad clauses, such as those recommended by the American Arbitration Association,¹²² would still encompass a wide range of arbitrable issues. The available relief under such agreements, however, would be limited to that traditionally allowed in contract situations. If parties do wish to submit to unorthodox contract remedies, the majority of courts would honor that choice.¹²³

Finally, allowing arbitrators to award only traditional contract remedies under broad arbitration clauses limits excessive arbitral authority. Because arbitration removes many of the protections available to litigants, courts should not expand arbitral powers beyond the constraints of the parties' contract. Although arbitrators must impose binding remedies for arbitration to succeed as an alternative to litiga-

118. See *supra* note 14 and accompanying text. Even the Eleventh Circuit in *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 776 F.2d 269, 270 n.1 (11th Cir. 1985), acknowledged that "punitive damages of course may not be received for pure breach of contract."

119. As the Seventh Circuit observed in *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1164 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), "arbitrators are rarely thought authorized to award punitive damages. It is not the kind of remedy that the parties probably would have agreed to authorize if they had thought about the matter, because of the great power it would give the arbitrator."

120. As one commentator explained, "[i]ncreased authority vested in arbitrators is a powerful incentive for parties to draft the narrowest possible arbitration agreements rather than those broad in scope." Comment, *supra* note 9, at 1113.

121. If a dispute later arises which the parties did not provide for in the arbitration agreement, they can still resort to litigation. Parties who include limited arbitration clauses do not waive their right to judicial hearings on the merits of disputes not encompassed within the agreement. *Davis v. Chevy Chase Fin. Ltd.*, 667 F.2d 160, 165 (D.C. Cir. 1981).

122. See *supra* note 12.

123. See *supra* note 79 and accompanying text.

tion, they do not need the inherent capacity to award all forms of relief. Rather, courts should balance arbitrators' implied authority under general arbitration agreements against the expectations and intent of contracting parties.¹²⁴ Limiting unorthodox contract remedies to the express consent of all parties decreases the potential for abuse of arbitral sanctions and protects parties from unexpected liability.¹²⁵

VI. CONCLUSION

Following the First Circuit's decision in *Raytheon*, parties entering into broad commercial arbitration agreements expose themselves to excessive arbitral powers. Once hearings begin, arbitrators can disregard objections to their authority and then impose binding, punitive sanctions despite their disputed status. In an effort to preserve judicial protections and to prevent arbitrators from awarding non-traditional contract remedies, parties would draft narrow arbitration agreements. As negotiations over the scope of arbitral authority increased, however, the economic efficiency of arbitration would decline.

The First Circuit could have avoided these consequences by mandating that arbitrators expressly resolve challenges to their authority before beginning substantive hearings. This requirement not only ensures judicial scrutiny, but also protects parties from incurring unexpected liability. In addition, as a guide to construing their authority under broad arbitration clauses, commercial arbitrators should award extraordinary contract remedies, such as punitive damages, only when expressly authorized in the contract. This rule both maintains the advantages of commercial arbitration and protects legitimate expectations and interests.

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124. In *Complete Interiors, Inc. v. Behan*, No. 88-922, slip op. at 2 (Fla. Dist. Ct. App. Jan. 4, 1990) (WESTLAW, State Library, Allstates file), the Florida District Court of Appeals held that commercial arbitrators cannot award punitive damages absent an express provision authorizing such relief. In rejecting both *Bonar* and *Willoughby*, the court reasoned that "[c]ontracting parties do not normally agree to assess exemplary damages for a breach of contract. . . . Contractual consent to so drastic a remedy for simple breach cannot be implied." *Id.* at 3 (quoting *International Union of Operating Eng'rs v. Mid-Valley, Inc.*, 347 F. Supp 1104, 1109 (S.D. Tex. 1972)).

125. One negative aspect of this proposal is that it may increase litigation. If parties do not provide for punitive damages in their arbitration agreement, and a tort claim later arises, parties seeking punitive awards may turn to the courts. In the rare situations where parties are pre-contractually concerned with tort liability, appropriate provisions should be made in the arbitration clause itself. Litigating an issue, however, is preferable to allowing arbitrators to impose punitive sanctions when they were never granted that authority.